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# Group Insolvency - Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism

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# GROUP INSOLVENCY—CHOICE OF FORUM AND LAW: THE EUROPEAN EXPERIENCE UNDER THE INFLUENCE OF ENGLISH PRAGMATISM

*Gabriel Moss QC\**

## I. INTRODUCTION

When the first humans came down from the trees and stood up straight, they operated in groups—usually closely knit family groups of persons related to each other. As with humans, so with artificial legal persons. Since business is done in groups of related entities, so rescue and restructuring, bankruptcy, and liquidations need to take place in the same groups.

Although the EC Regulation on Insolvency Proceedings,<sup>1</sup> the European statute which applies generally on this subject, looks like a relatively recent document, it is in substance the text of the failed convention on the same subject which had been negotiated for many years prior to its failure to come into effect in 1996.<sup>2</sup> Thus the text and the concepts of the EC Regulation were already long out of date at the time that the EC Regulation, containing a very similar text to that in the failed 1996 convention, came into force on May 31, 2002.<sup>3</sup>

The other important background point is that in Europe, not only the continental but also the U.K.-type systems of law,<sup>4</sup> generally enforce a strict separation between different legal entities and deal with each entity

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1. Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC). The text can be found with a commentary in GABRIEL S. MOSS ET AL., *THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE* (2002). Although the body of the statute has not changed, the annexes, which, among other things, list the types of proceedings and the types of liquidators covered, have been updated from time to time to deal with the expansion of the number of countries affected (now twenty-six, i.e., the twenty-seven E.U. countries excepting Denmark) and changes in domestic procedures in the various countries covered.

2. The EC Regulation's history is set out by Professor Fletcher in Chapter 1 of MOSS ET AL., *supra* note 1.

3. Council Regulation 1346/2000, art. 47, 2000 O.J. (L 160) 1 (EC).

4. See *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.), and the many cases which have followed it in over 100 years.

separately, especially in the context of insolvency proceedings.<sup>5</sup> There are exceptions, and the United Kingdom, for example, in exceptional circumstances, allows substantive consolidation of estates.<sup>6</sup>

The negotiators of the original Convention on Insolvency Proceedings (Convention) were aware that no provision whatsoever was being made for groups as such. Thus paragraph 76 of the Virgos-Schmit Report on the Convention states:

The Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes).

The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity.

Naturally, the drawing up of a European norm on associated companies may affect this answer.<sup>7</sup>

There was thus an awareness of a problem in relation to groups but any solution was put off to another day. There is no sign that the European Legislature is about to discuss groups, but the author knows that UNCITRAL has started work on the subject.

By the time the EC Regulation came into force, the nature of trading in groups had changed further in that some groups operated their businesses in terms of "divisions" which cut across different corporate personalities. A system which ignored these commercial realities was bound to set up difficult tensions and conflicts.

## II. A BRIEF DESCRIPTION OF JURISDICTION AND CHOICE OF LAW UNDER THE EC REGULATION

The EC Regulation applies to all companies whose "centre of main interests" is located within the European Union<sup>8</sup> (except Denmark<sup>9</sup>—this exception is hereafter assumed rather than restated). This is irrespective

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5. *Polly Peck Int'l Fin., Ltd. v. Polly Peck Int'l Plc. (Re Polly Peck Int'l Plc.)*, (1996) 2 All E.R. 433 (Ch) (Eng.), [1996] B.C.C. 486, 495.

6. *Re Bank of Credit and Commerce Int'l SA* (No. 2), [1992] B.C.C. 715 (CA Civ. Div.)

7. The Report, which never acquired official status as a result of the failure of the Convention, but which has been cited extensively to explain the EC Regulation, appears as Appendix 2 in MOSS, *supra* note 1.

8. The European Union now consists of twenty-seven countries, Bulgaria and Romania having joined on January 1, 2007. Dan Bilefsky, *Romania and Bulgaria Celebrate Entry into European Union*, N.Y. TIMES, Jan. 2, 2007.

9. Council Regulation 1346/2000, Recital (33), 2000 O.J. (L 160) 1 (EC).

of the place of registration of the company.<sup>10</sup> The rule of allocation between European Union (E.U.) Member States is that jurisdiction to open main proceedings is in the Member State where the center of main interests of the company within the European Union is located.<sup>11</sup> Jurisdiction to open secondary proceedings is found in any Member State where there is “establishment” of the corporate entity.<sup>12</sup>

There is no definition of “centre of main interests” in the text of the Regulation itself, but there is in the Recitals a sentence which has since, rather inaccurately, been referred to as a “definition.” This is contained in the text of Recital (13): “The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”<sup>13</sup>

As a definition this is both brief and rather vague, and is in fact not intended to be a definition but rather a concise description. The words used are copied from the first subparagraph of paragraph 75 of the Virgos-Schmit Report.<sup>14</sup> What happened was that since the Convention never took effect, the Virgos-Schmit Report never acquired official status. However, the Community legislator, in order to help people understand the EC Regulation, took some phrases from the Virgos-Schmit Report, such as the one above, for explanatory effect.

However, to take the introductory subparagraph of paragraph 75 of the Virgos-Schmit Report as a definition is plainly wrong.<sup>15</sup> The rest of

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10. *In re BRAC Rent-A-Car Int'l, Inc.*, [2003] EWHC (Ch) 128, [2003] 1 W.L.R. 1421 (Eng.).

11. Since some Member States, such as the United Kingdom, are themselves multi-jurisdictional states, it is important to note that the EC Regulation provides no rule for the allocation of jurisdiction between the different legal jurisdictions *inside* the Member State. Thus if, for example, jurisdiction in a particular case is allocated to the United Kingdom because the center of main interests is there, the question of which country within the United Kingdom has jurisdiction to open the proceedings, i.e., England and Wales, Scotland, or Northern Ireland, is a matter of U.K. law rather than European community law.

12. The author is ignoring for present purposes the ability in some situations to open independent territorial proceedings prior to the opening of main proceedings in the center of main interests.

13. Council Regulation 1346/2000, Recital (13), 2000 O.J. (L 160) 1 (EC).

14. MOSS ET AL., *supra* note 1, app. 2.

15. The European Court of Justice, in Case C-341/04, Eurofood IFSC, Ltd., 2006 E.C.R. I-3813, at paragraph 33, uses the word “definition” in relation to Recital (13), but in the context this is simply the equivalent of “[t]he scope of that concept is highlighted” in paragraph 32. On this basis, Registrar Jaques in *Stojecvic v. Komercni Banka A.S.* (December 20, 2006) rejected the submission that Recital (13) contained a definition. *Id.* at para. 31 (unreported; text of judgment on file with author).

paragraph 75 goes on to explain the “centre of main interests” concept in more detail and is the nearest thing we have to an authoritative explanation of what was intended by the concept. The final sub-paragraph of paragraph 75 states that “[w]here companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor’s centre of main interests is the place of his registered office. This place normally corresponds to the debtor’s head office.”<sup>16</sup>

To understand the import of this statement, one has to recall that domestic law in Europe has two different approaches. In the United Kingdom, for example, the historic approach was based on the place of registration. According to this approach, if there were to be proceedings in more than one country, the main proceedings would take place in the jurisdiction of the place of registration, and proceedings in other jurisdictions would be ancillary to the main proceeding.<sup>17</sup>

In Europe (excluding Scandinavia), on the other hand, the approach was to focus on the “seat” of the company,<sup>18</sup> which is most likely the idea behind the “centre of main interests” concept. Article 3 of the EC Regulation, which lays down the rules of allocation for opening main and secondary proceedings, is in reality a compromise between the two approaches. Although in substance the “seat” approach has won, Article 3 of the EC Regulation takes on the appearance of a compromise by using a new concept—“centre of main interests”—and introducing a presumption, rebuttable by appropriate evidence, that the “centre of main interests” is in the place of registration.<sup>19</sup> Finally, the last subparagraph of paragraph 75 of the Virgos-Schmit Report tactfully glosses over the conflict and simply points out that the registered office is normally the debtor’s “head office.”<sup>20</sup>

### III. PRACTICAL PROBLEMS

From a practical point of view, having separate main proceedings in each place where each subsidiary in a group is registered is wasteful, duplicative, expensive, and likely to impede a rescue, reconstruction, or beneficial realization of the business of the group. In theory, in a large group spread over the European Union, one can have twenty-seven<sup>21</sup> or

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16. MOSS ET AL., *supra* note 1, app. 2 at 282.

17. *In re English Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, 394 (U.K.).

18. See MOSS ET AL., *supra* note 1, at para. 3.11.

19. Council Regulation 1346/2000, art. 3(1), 2000 O.J. (L 160) 1 (EC).

20. MOSS ET AL., *supra* note 1, app. 2 at 282.

21. Note that the EC Regulation only applies in twenty-six out of the twenty-seven countries, Denmark being excluded.

more different main proceedings governed by different systems of law with different “liquidators” (a term which is defined in the EC Regulation to include, among others, administrators)<sup>22</sup> operating under twenty-seven different systems of law,<sup>23</sup> answerable to twenty-seven different courts and speaking (not quite) twenty-seven different languages.<sup>24</sup> It is difficult to see how any sensible rescue, reconstruction, or beneficial sale can take place in such a situation. If in fact the group trades in “divisions,” cutting across different legal entities, the position becomes even more difficult.

A number of the group cases which have arisen of course have a strong U.S. connection. There is often an ultimate parent in the United States and there may well be a European subgroup centered on the United Kingdom. The business may nowadays be global and the places of incorporation may well not correspond to the place where business is actually conducted.

#### IV. THE ENGLISH CASE LAW EXPERIENCE

In a purely domestic context in England, the normal practice would be for the same persons to be appointed as, say, administrators to each company in a group of companies in financial trouble. This made the coordination of a rescue, reconstruction, or beneficial sale relatively easy compared to each proceeding being led by a different person from a different organization.<sup>25</sup> The advent of the EC Regulation meant that in appropriate cases, a similar pragmatic approach could be taken in relation to foreign-registered subsidiaries.

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22. Council Regulation 1346/2000, art. 2(b), 2000 O.J. (L 160) 1 (EC). See also the list, in Annex C to the EC Regulation, referred to by Article 2(b). The list has been updated from time to time. *See supra*, note 1.

23. In practice, an underestimate, since the United Kingdom itself (which for this purpose excludes small offshore islands such as the Channel Islands and the Isle of Man but includes Gibraltar) have four legal systems, i.e., England and Wales, Scotland, Northern Ireland, and Gibraltar, and there are material differences in insolvency law and procedure between them.

24. The language situation is complicated. Some countries, e.g., Germany and Austria, share the same language, but others have more than one official language, e.g., Belgium (French and Flemish), Finland (Swedish as well as Finnish), Ireland (Irish and English), and the United Kingdom (where Welsh is an official language within Wales).

25. English courts are relatively relaxed about the potential conflicts of interest and expect liquidators and others to work out ways of dealing with them as and when they arise. *Re Esal (Commodities) Ltd.*, (1988) 4 B.C.C. 475 (CA Civ. Div.).

*A. Enron Directo SA, Lightman J., July 4, 2002*

The first opportunity arose in the case of Enron Directo Sociedad Limitada (Enron Directo), a Spanish-incorporated Enron European company trading in Spain on a daily basis but whose headquarters' functions were carried out from European group headquarters in London. The judge accepted the argument that the center of main interests of this Spanish-registered company was in the United Kingdom and made an administration order as a main proceeding within the EC Regulation.<sup>26</sup> The other relevant European Enron companies incorporated in England were already in administration.<sup>27</sup> Thus the insolvency administration of *Enron Directo* could be run in the context of the insolvency administration of the group by the same administrators. Since, under Article 4 of the EC Regulation, English law applied to the proceedings in *Enron Directo*,<sup>28</sup> there was no question of consolidating either assets or liabilities with any other company, since English law does not permit this, save in very exceptional and rare cases.<sup>29</sup>

*B. Re Daisytek-ISA Ltd. (Re Daisytek)<sup>30</sup>*

*Re Daisytek* was the case which really stirred things up in Continental Europe. Assisted by the successful written argument in the *Enron Directo* case, the judge in *Re Daisytek* made administration orders as main proceedings, not only for English companies in the European subgroup, but also for French- and German-registered companies.<sup>31</sup> This was again on the basis that whilst current operations may have been going on in France and Germany, the head-office functions were carried out in England.<sup>32</sup>

As sometimes happens in England, the administration order appeared immediately but the judgment setting out the detailed reasons appeared some time later. To the author's understanding, this is wholly unknown in Continental Europe, where what in England are called the "order" and

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26. There is, unfortunately, no judgment, but the written argument accepted by the judge can be found on the Web site of the International Insolvency Institute. Skeleton Argument on Behalf of the Petitioner, *In re Enron Directo Sociedad Limitada*, High Court (Chancery), available at [http://www.iiiglobal.org/country/european\\_union/Enron\\_Directo\\_Skel.pdf](http://www.iiiglobal.org/country/european_union/Enron_Directo_Skel.pdf).

27. *Id.*

28. Council Regulation 1346/2000, art. 4, 2000 O.J. (L 160) 1 (EC).

29. *Re Bank of Credit and Commerce International SA* (No. 2), [1992] B.C.C. 715 (CA).

30. [2003] B.C.C. 562 (Ch).

31. *Re Daisytek-ISA Ltd.*, [2003] B.C.C. 562 (Ch).

32. *Id.*

“judgment” are always in the same document. It thus created an unfortunate impression when the order was presented, without the reasoned judgment (which was not yet written), to the French and German courts, and they were told that they were required to recognize the orders automatically and without enquiry pursuant to Article 16 and subsequent articles of the EC Regulation.<sup>33</sup>

The other difficulty at the time was that under Continental European systems such as those of France and Germany, directors have a statutory obligation to file a proceeding in court within a short period of obtaining knowledge of the insolvency of their company or face civil and criminal sanctions.<sup>34</sup> It was not clear at the time of *Re Daisytek* whether a filing in respect of a French or German company in England would be sufficient compliance with this obligation.

In France, the director who had himself caused the English filings made a separate filing, to protect his personal position, with a local commercial court.<sup>35</sup> This needed to be on notice to the public prosecutor, who takes part in the hearing.<sup>36</sup> One also must remember here that commercial court judges in France are not professional judges or even legally qualified, although they do have legal assistance. The French court could not believe that the English court had really intended to put a French-registered company into administration in England and considered that the English court must have confused the separate French entity with a branch of the English parent.<sup>37</sup> The French court thus considered the English administration order to be void and made a French administration order.<sup>38</sup>

Under the French system, the English administrators could apply to set aside this order and, as one would expect, did so, but failed to have it set aside.<sup>39</sup> They did, however, appeal successfully to the Court of Appeal in Versailles.<sup>40</sup> Importantly, by this stage, the reasoned judgment from England was available and the Court of Appeal in Versailles could see that

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33. Translations of the French and German first-instance judgments are on file with the author. See also the Versailles Court of Appeal judgment, by which stage the reasoned judgment of the English court was available. Cour d'appel [CA] [regional court of appeal] Versailles, Sept. 4, 2003, [2003] B.C.C. 984 (Fr.) (Klempka v. ISA Daisytek SA).

34. See, e.g., Skeleton Argument on Behalf of the Petitioner, *In re Enron Directo Sociedad Limitada*, High Court (Chancery).

35. Translation of the French first-instance judgment (on file with the author).

36. *Id.*

37. *Id.*

38. *Id.*

39. Cour d'appel [CA] [regional court of appeal] Versailles, Sept. 4, 2003, [2003] B.C.C. 984, 987 (Fr.) (Klempka v. ISA Daisytek SA).

40. *Id.*



the English judge had gone through a proper process of reasoning in order to hold that the presumption based on the location of the registered office had been rebutted by the facts pointing to the center of main interests being in England. The French Court of Appeal thus recognized the opening of proceedings in England and voided the French opening.<sup>41</sup> The French public prosecutor, who is a party to such proceedings in France, was still dissatisfied and appealed the matter to the French Supreme Court (*Cour de Cassation*), which eventually dismissed the appeal.<sup>42</sup>

One point that troubled the French was that under French law the employees of a company have important rights to be consulted about the opening of insolvency proceedings.<sup>43</sup> Such rights do not exist under English law, which under Article 4 of the EC Regulation governs the criteria for opening proceedings.<sup>44</sup>

The German courts were, in principle, much more cooperative. In the case of one of the German subsidiaries, there was a mistake as to the facts and it was thought that proper notice had not been given to the relevant director of the company.<sup>45</sup> Once this factual mistake was cleared up, recognition was given in Germany.<sup>46</sup>

The *Daisytek* case caused something of a storm of protest in Europe which has not entirely died down. While attending a conference organized by INSOL Europe in the City of Cork in Ireland, the distinguished Professor Paulus, a leading German authority in this area, denounced the British courts as “imperialists.” Subsequently, however, at the second-annual German Insolvency Congress in Berlin, the author explained in his presence that the English courts were pragmatists rather than imperialists, and peace has been declared sufficiently to enable us to write an Article together calling for various urgent reforms to the EC Regulation.<sup>47</sup>

The good practical sense of the approach in *Enron Directo* and *Daisytek* has meant that it has been followed in other countries. In *Hettlage*

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41. *Id.* at 992.

42. Cass. com., June 27, 2006, [2006] B.C.C. 841 (Fr.) (French Republic v. Klempka).

43. Cour d'appel [CA] [regional court of appeal] Versailles, Sept. 4, 2003, [2003] B.C.C. 984 (Fr.) (Klempka v. ISA Daisytek SA).

44. Council Regulation 1346/2000, art. 4, 2000 O.J. (L 160) 1.

45. The history is set out in the first instance court judgment of March 12, 2004 (Amtsgericht Düsseldorf) (translation on file with author).

46. *Id.*

47. Gabriel Moss & Christoph Paulus, *The European Insolvency Regulation—The Case for Urgent Reform*, 19 INSOLVENCY INTELLIGENCE 1 (2006).

*AG* (a.k.a. *Hettlage Austria*),<sup>48</sup> the German insolvency court in Munich applied a similar approach in relation to an Austrian-registered company in a German group.<sup>49</sup> In the Hungarian case of the *Parmalat Group*,<sup>50</sup> a particular company (Mliekotej, a.k.a. Parmalat Slovakia) was incorporated in Slovakia, which has a particularly business-friendly approach in respect of, inter alia, taxes, but was run from Hungary.<sup>51</sup> Main proceedings were opened by the Hungarian local court.<sup>52</sup> In France, after the French had reconciled themselves to the approach of “Perfidious Albion,”<sup>53</sup> they very efficiently adopted it themselves in the case of *MPOTEC GmbH*, a German-registered company run as part of a French group.<sup>54</sup> It was only a matter of time before they got a chance to do it to the English themselves. This occurred as recently as August 2, 2006 in the case of *Eurotunnel Finance Limited*,<sup>55</sup> an English-registered company which is part of the Eurotunnel group. That case is being appealed.

Interestingly, whereas the English, German, and Hungarian courts had focused mainly on the need to fulfill the statutory criteria of Article 3 of the EC Regulation by having resort to “the head office functions” approach to rebut the presumption of place of incorporation, the French seemed quite happy to give as an additional rationalization, in their cases, the pragmatic usefulness of running insolvency proceedings from the same place from which the group itself had been run. There is no better statement of English pragmatism than in the French judgments. For example, in the *MPOTEC* case, the relevant case law is summarized as follows:

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48. Amtsgericht München [AG] May 4, 2004, ZIP 20/2004, 962 (F.R.G.) (unofficial translation on file with author).

49. *Id.*

50. Municipal Court of Fejer/Szekesfehervar (Hung.) (unreported; unofficial translation on file with author).

51. *Id.*

52. *Id.*

53. A translation of the mid-nineteenth century French expression “*la perfide Albion*,” referring to the French view that the British are treacherous in their dealings with foreigners. See “Albion,” OXFORD ENGLISH DICTIONARY (2d ed. 1989).

54. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Feb. 15, 2006 [2006] B.C.C. 681 (Fr.). Interestingly, this was a decision of the Tribunal de Commerce of Nanterre, whose district includes the area outside Paris where the corporate head office towers banned from the center of Paris, France, are located—in other words the location of many head office functions!

55. Tribunal de commerce Paris, Aug. 2, 2006 (Fr.) (unreported) (unofficial translation on file with the author).

The analysis of the case law of the various Member States shows that courts adopt a pragmatic approach tending to allow streamlining of strongly integrated groups of companies.

In this respect, the centralisation of proceedings permits the avoidance of the partitioning effects linked to the opening of several main proceedings in different Member States. It is indeed desirable that the management of different companies continues thanks to a centralisation of different main proceedings under the supervision of just one court in order to allow the implementation of a global administration plan.

This pragmatic approach preserves the legal personality of the subsidiary which is not considered as a branch of the parent company within the meaning of Regulation 1346/2000. Above all, this approach allows the opening of secondary proceedings, independently of the location of the registered office, in order to better take into account of the interests of employees and local creditors. This interpretation was retained by the German and Austrian case law in the *Daisytek . . . Automold*, *Hettlage* and *Rover* cases and, more recently, by the judgment of December 15, 2005, by the Court of Appeal of Versailles.<sup>56</sup>

#### V. THE "HEAD OFFICE FUNCTIONS" TEST IN THE EUROPEAN COURT OF JUSTICE

For technical reasons, which the author will not deal with in detail here, but which were explained in *The EC Regulation on Insolvency Proceedings*,<sup>57</sup> a reference seeking guidance on questions of European law cannot be sought in respect of the EC Regulation except when one has reached the final appellate court in one's own system. Note, however, that this is not like an appeal to the U.S. Supreme Court, since the procedure involves not an appeal but rather the reference of particular issues of European law, designed to enable the national final appellate court to make its decision in the light of the rulings as to European law on those issues. Ultimately, getting the right answers depends on asking the right questions.

In terms of getting such rulings, the Irish have a great advantage: they only have one level of appeal, which is from the High Court to the Supreme Court.

The insolvency of the Parmalat Group in Italy has led to great deal of interesting legal work in the United States, the Caribbean, and Europe. One of the Parmalat subsidiaries was an Irish-registered company called Eurofood, registered in Ireland in order to take advantage of the favor-

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56. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Feb. 15, 2006 [2006] BCC 681, 687-88 (Fr.) (MPOTEC GmbH).

57. MOSS ET AL., *supra* note 1, para. 2.34.

able tax climate in the Dublin docks. The entity itself had no employees and was run by Bank of America,<sup>58</sup> a close business associate of Parmalat before its insolvency.

Although Eurofood had a board consisting of Irish and Italian directors, since Eurofood had no business other than the raising of money for the Parmalat Group it can be inferred that the steps that Eurofood took were under the ultimate direction of the Parmalat parent in Italy. In any event, Eurofood only carried out three transactions—two transactions raising money guaranteed by the Italian parent and one swap.<sup>59</sup> Fearing that the Italians were (from Bank of America's point of view) going to move the center of main interests to Italy, Bank of America swooped by filing a petition to wind up in Ireland and applying successfully for the appointment of a provisional liquidator in order to prevent the center of main interests' moving.<sup>60</sup> When the matter subsequently came before the Italian court in Parma, that court held that the appointment of a provisional liquidator had not opened proceedings in Ireland and that the center of main interests was in Italy.<sup>61</sup> Accordingly, the court opened main proceedings in respect of the company.<sup>62</sup>

However, when the winding-up petition was heard in Ireland, the Irish court held that the appointment of the provisional liquidator had opened a proceeding and, amongst other things, the Irish court also declined to recognize the Italian opening because it believed that the provisional liquidator had not been fairly treated in the Italian proceedings.<sup>63</sup> Subsequently, the opening of main proceedings in Ireland was appealed by the Italian administrator to the Irish Supreme Court.<sup>64</sup> The Irish Supreme Court made it clear that they thought the Irish courts were correct, but nevertheless put a series of rather loaded questions to the European Court of Justice designed to elicit answers which would confirm the Irish courts' approach.<sup>65</sup> The Irish Supreme Court was not, generally speaking, disappointed. For present purposes, the author will only deal with the ruling in relation to "centre of main interests."

In such proceedings before the European Court of Justice, detailed written arguments are submitted and a brief oral argument takes place,

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58. *See Re Eurofood IFSC, Ltd.*, [2005] B.C.C. 999, 1003 (S.C.) (Ir.).

59. *Id.* at 1004.

60. *Id.* at 1005.

61. *Id.* at 1005–06. A translation of the judgment of the Italian court is on file with the author.

62. *Re Eurofood IFSC, Ltd.*, [2005] B.C.C. 999, 1003 (S.C.) (Ir.).

63. *Id.* (citing *Re Eurofood IFSC, Ltd.*, [2004] B.C.C. 383 (H. Ct.) (Ir.)).

64. *Id.*

65. *Id.* at 1013; *see* Case C-341/04, *Eurofood IFSC, Ltd.*, Opinion of Mr. Advocate General Jacobs, 2006 E.C.R. I-3813.

after which the Advocate General, who is part of the court, gives his opinion. This is then considered by the judges of the court. In most cases the opinion is accepted and the court itself gives a brief judgment. In a minority of cases the opinion is rejected and acquires the status of a minority opinion. In cases where the opinion is accepted, since the eventual judgment is usually much more concise, the opinion can be looked to for further reasoning.

In the *Eurofood* case, the judgment of the court says nothing at all about the “head office functions” test.<sup>66</sup> This is due to the form of the question, which gave the European Court of Justice the choice of locating the center of main interests either in the place of the registered office, being also the place described by Recital (13) of the Regulation as the center of main interests,<sup>67</sup> or in the place where the parent, by virtue of its shareholding and its power to appoint directors, controls the policy of the subsidiary.<sup>68</sup> Given that choice, the European Court of Justice obviously had to vote for the description of the center of main interests appearing in Recital (13). This, of course, said nothing whatsoever about situations where the registered office was in one place and the head-office functions were conducted in another.

In order to see what has been said in the European Court of Justice about the “head office functions” test, one therefore needs to refer to the Advocate General’s Opinion, which the court generally followed in the case:

Dr Bondi and the Italian Government submit that if it is to be demonstrated that the centre of main interests is somewhere other than the State where a company’s registered office is located, it consequently needs to be shown that the head office’ type of functions are performed elsewhere. The focus must be on the head office functions rather than simply on the location of the head office because a ‘head office’ can be just as nominal as a registered office if head office functions are not carried out there. In transnational business the registered office is often chosen for tax or regulatory reasons and has no real connection with the place where head office functions are actually carried out. That is particularly so in the case of groups of companies, where the head office functions for the subsidiary are often carried out at the place where the head office functions of the parent of the group are carried out.

. . . I find those submissions sensible and convincing. They do not, however, seem to me very helpful in answering the question. They do

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66. Case C-341/04, *Eurofood IFSC, Ltd.*, Judgment, 2006 E.C.R. I-3813.

67. Council Regulation 1346/2000, Recital (13), 2000 O.J. (L 160) 1.

68. Case C-341/04, *Eurofood IFSC, Ltd.*, Opinion of Mr. Advocate General Jacobs, 2006 E.C.R. I-3813.

not in particular demonstrate that a parent company's control of the subsidiary's policy determines that subsidiary's 'centre of main interests' within the meaning of the Regulation.<sup>69</sup>

Thus, one can see an express endorsement of the "head office functions" approach to rebutting the place of registration as the center of main interests. Accordingly, all those in Europe who appear to have the impression that the European Court of Justice has somehow overturned or disapproved of the previous case law have a mistaken impression.

Indeed, the *MPOTEC* case cited above was decided after the Advocate General's Opinion had come out and with express reference to it,<sup>70</sup> and the *Eurotunnel* case was decided after the European Court of Justice Judgment came out, although it does not expressly refer to it. Each of these two cases follows the pre-*Eurofood* line of cases, using the "head office functions" approach.<sup>71</sup>

What the European Court of Justice Judgment does do is emphasize that the facts rebutting the presumption of registered office must be "objective and ascertainable by third parties."<sup>72</sup> There is nothing surprising or novel in that.

## VI. HOW TO AVOID SECONDARIES

Even if one has succeeded in opening main proceedings for all the companies in a group in one location, the smooth process of rescue, reconstruction, or beneficial sale can be disrupted by the opening of a secondary proceeding which would then apply local law to local assets. This was the type of potential difficulty encountered in the European operations of the Collins and Aikman Group, another U.S.-led group.

A good start was made by opening main proceedings for companies in a number of differently registered subsidiaries in England.<sup>73</sup> However, the filing of secondary proceedings by local creditors would have disrupted the process of trying to sell the group business by the U.K. administrators in charge of all the main proceedings. The legitimate concerns of local creditors were that if only main proceedings were opened the choice of law dictated by Article 4 of the EC Regulation would mean

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69. *Id.*, paras. 111–12. The author was lead Counsel for Dr. Bondi, the special administrator appointed by the Italian government.

70. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Feb. 15, 2006 [2006] B.C.C. 681 (Fr.) (*MPOTEC GmbH*).

71. *Id.* at 687; see Tribunal de commerce Paris, Aug. 2, 2006 (Fr.) (*Eurotunnel*) (unreported) (unofficial translation on file with the author).

72. Case C-341/04, *Eurofood IFSC, Ltd.*, Judgment, 2006 E.C.R. I-3813, para. 34.

73. *Re Collins & Aikman Corp. Group* (Application for Administration Orders), [2005] EWHC (Ch) 1754, [2006] B.C.C. 606 (Eng.).

that local priorities would not apply.<sup>74</sup> These included equitable subordination provisions in Germany and Spain, the application of which would have had a considerable beneficial effect for local trade creditors.<sup>75</sup>

The administrators met with committees of local creditors and in order to prevent them from opening secondaries gave them assurances to the effect that local priorities would be respected.<sup>76</sup> As a result, a very good sale of the group business (with some exceptions) without the opening of secondaries (again with some exceptions) took place, achieving a considerably higher return than had been forecast.<sup>77</sup> The remaining legal problem was the ability of the administrators to keep their promises, given that the mandatory terms of Article 4 of the EC Regulation required the application of English law and English law priorities. Fortunately for the administrators, we<sup>78</sup> were able to find no less than three grounds, accepted by the judge, for justifying the giving of assurances and their fulfillment.<sup>79</sup>

If sufficient flexibility can be found in other European laws where main proceedings are opened, *Collins & Aikman* will be an obvious model for the way to harmonize the need for centralization and simplicity, on the one hand, and the respecting of local priorities, on the other. The indirect application of local priorities through the provisions of English statute and case law also neatly balances the charges of imperialism and demonstrates that the application of the "head office functions" test has in fact been a triumph of pragmatism.

For the sake of completeness, it is important to mention that there are some limited situations in which the opening of secondary proceedings is either necessary or beneficial. Examples include situations where the local law is more helpful in terms of the transfer of employees to a purchaser or where the application of local law is necessary to restrain enforcement of a security interest, since the enforcement of security interests in other Member States forms an exception from the general applicability of the law of the main proceedings.<sup>80</sup>

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74. Council Regulation 1346/2000, art. 4, 2000 O.J. (L 160) 1.

75. See *Re Collins & Aikman Europe SA*, [2006] EWHC (Ch) 1343, [2006] B.C.C. 861.

76. *Id.*

77. *Id.*

78. The author acted as Lead Counsel for the administrators on this application.

79. *Re Collins & Aikman Europe SA*, [2006] EWHC (Ch) 1343, [2006] B.C.C. 861.

80. Council Regulation 1346/2000, art. 5, 2000 O.J. (L 160) 1.